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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 554.

J. DAVID BROUGHTON,
Appellant,

vs.

THE STATE OF OHIO,
Appellee.

ON APPEAL FROM THE FINAL ORDER OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING AN APPEAL OF THE JUDGMENT OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, STATE OF OHIO, AFFIRMING THE CONVICTION OF THE APPELLANT [PURSUANT TO 28 U. S. C. SECTION 1257 (2)].

JURISDICTIONAL STATEMENT.

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TABLE OF CONTENTS.

A. Opinions Delivered in Court Below 1

B. Statement of the Grounds on Which Jurisdiction Is Invoked 2

C. Statute and Criminal Penalties Involved 3

D. Questions Presented 4

E. Statement of the Case 5

F. The Questions Presented Are Substantial and Were Wrongly Decided Below 7

1. The Issues Being Fundamental in Nature and Widespread in Consequence Are Substantial 7

2 The Ohio Sunday Closing Law and the Enforcement Thereof Violates the Constitutional Mandate That Church and State Be Separated 10

a. The Ohio Sunday Closing Law Constitutes a Legislative Aid to Religion 10

b. The Ohio Sunday Closing Law Prefers One Religion and Prohibits the Free Exercise of Others 11

c. The Seventh Day Exemption Under the Ohio Sunday Closing Law Constitutes Aid to Religion and/or Religious Discrimination 13

3. The Ohio Sunday Closing Law, Bearing No Reasonable Relation to the Health and Safety of the Public, Violates the Due Process Clause of the Constitution of the United States 15

a. The Statute Deprives This Appellant and Others of Valuable Rights and Property 15

b. Appellant Is Deprived of These Valuable Rights Without Due Process of Law 15

4. The Ohio Sunday Closing Law Denies This Appellant and Others Equal Protection of the Laws in Violation of the Fourteenth Amendment to the Constitution of the United States 18

a. The Legislature Has the Right to Make Classifications Based Upon Real and Substantial Differences 18

b. The Classification Made By the Ohio State Legislature Is Not Based Upon Real and Substantial Differences Amongst Classes 19

c. The Ohio Sunday Closing Law Discriminates Against Observers of the Seventh Day of the Week as the Sabbath in Violation of the Equal Protection Clause of the Constitution of the United States 21

5. This Court's Acceptance of Other Similar Cases for Hearing in This Term Indicates That the Issues Presented Here Are Substantial 22

Conclusion: Appellant prays that this Court note probable jurisdiction and set this case for hearing with the several other similar cases now pending before it 23

APPENDICES:

A. Court's Finding and Fine 25

B. Journal Entry of the Court of Appeals of Cuyahoga County, Ohio 26

C. Final Order of the Supreme Court of the State of Ohio 27

TABLE OF AUTHORITIES.

Cases.

Bargaintown, U. S. A., Inc. v. Whitman, Supreme Court of the United States, October Term 1960, Dkt. No. 76 22

Brown v. Board of Education, 347 U. S. 483 (1953) 14

Cincinnati v. Correll, 141 O. S. 535, 49 N. E. 2d 412 (1943) 16, 18

Commonwealth v. Has, 122 Mass. 40 (1877) 13, 23

Commonwealth of Pennsylvania v. Cavalero, U. S. Law Week 2551 (1960) 12

Crown Kosher Supermarket of Mass. v. Gallagher, 176 F. Supp. 466 (D. Mass. 1959) 18, 21

Everson v. Bd. of Education, 330 U. S. 1 (1947) 2, 11

Gallagher v. Crown Kosher Super Market of Massachusetts, Inc., Supreme Court of the United States, October Term 1960, Dkt. No. 11 ..... 13, 22

McCollum v. Board of Education, 333 U. S. 203 (1948) 10

McGowan v. Maryland, Supreme Court of the United States, October Term, 1960, No. 8 ..... 2, 22

Morey v. Doud, 354 U. S. 457 (1957) 18

State v. Haase, 97 O. App. 377, 116 N. E. 2d 224 (1953) 10

State v. Kidd, 167 O. S. 521 (1958), 150 N. E. 2d 413 6

State v. Woodville Appliance Inc., 13 O. O. 2d 46 (1960) 14

Two Guys From Harrison-Allentown, Inc. v. McGinley, Supreme Court of the United States, October Term 1960, Dkt. No. 36 22

West Virginia v. Board of Education, 319 U. S. 624 (1943) 13

Winters v. New York, 333 U. S. 507 (1948) 2

Constitution.

Constitution of the United States:

First Amendment	6, 7, 12
Fourteenth Amendment	6, 7, 12

Statutes.

Ohio Revised Code:

Sec. 3773.24	2, 3, 4, 5, 6
Sec. 3773.99(Q)	4, 7
28 U. S. C. 1257(2)	2

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JURISDICTIONAL STATEMENT.

A. OPINIONS DELIVERED IN COURT BELOW.

The findings of fact and conclusions of law of the Municipal Court of Garfield Heights, State of Ohio, are unreported and are attached and made a part of this jurisdictional statement as Appendix A. The conviction was affirmed by the Court of Appeals for the County of Cuyahoga, State of Ohio, in an unreported decision without opinion. The Journal Entry of that Court is attached to this jurisdictional statement as Appendix B. The Supreme Court of the State of Ohio by a decision dated July 6, 1960 dismissed an appeal from the decision of the Court of Appeals of Cuyahoga County, State of Ohio, for the

reason that no debatable constitutional question was involved. This decision is reported at 171 O. S. 261. This is a final order of the highest court in the State of Ohio. It is attached to this jurisdictional statement as Appendix C.

B. STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED.

Appellant was convicted of a violation of Ohio Revised Code Section 3773.24, a so-called Sunday Closing Law. The Appellant seeks a review of this conviction on August 27, 1959 by the Municipal Court of Garfield Heights; which was affirmed by the judgment of the Court of Appeals for Cuyahoga County, State of Ohio, on April 8, 1960; and which later decision was sustained by a final order of the Supreme Court of the State of Ohio when it dismissed an appeal as of right on July 6, 1960. Notice of Appeal was filed in the Supreme Court of the United States on September 28, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257 (2), the appeal being from a decision "where there was drawn in question the validity of a statute of a State on the ground that it is repugnant to the Constitution of the United States and the decision was in favor of its validity." *Everson v. Bd. of Education*, 330 U. S. 1 (1947), *Winters v. New York*, 333 U. S. 507 (1948), *McGowan v. Maryland*, Supreme Court of the United States, October Term, 1960, No. 8.

C. STATUTE AND CRIMINAL PENALTIES INVOLVED.

R. C. Sec. 3773.24, as amended by the Ohio Legislature in 1959 (sometimes referred to herein as the Ohio Sunday Closing Law) reads in full as follows:

"No person, firm, or corporation shall engage in common labor or suffer or permit a building or place to be open for transaction of business, or require a person in his employ or under his control to engage in common labor or to open a building or place for the transaction of business on Sunday. In prosecutions under this section complaints shall be made within ten days after a violation.

"This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.

"This section shall not apply to:

(A) Traveling or the providing of services and commodities incidental thereto;

(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;

(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;

(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto."

R. C. Sec. 3773.99(Q) reads in full as follows:

"Whoever violates section 3773.24 of the Revised Code shall be fined twenty-five dollars for a first offense; for each subsequent offense such person shall be fined not less than fifty nor more than one hundred dollars and imprisoned not less than five nor more than thirty days."

D. QUESTIONS PRESENTED.

The following questions are presented:

1. Whether Ohio Revised Code Section 3773.24, and the enforcement thereof, are unreasonable, arbitrary and discriminatory in the selection and classification of the individual's, businesses and commodities affected, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, in particular as applied to or enforced against the Appellant, the manager of a retail store, and against the shareholders, employees and officers, and the customers of such a store.

2. Whether Ohio Revised Code Section 3773.24, and the enforcement thereof, bear no reasonable relationship to the health, safety and welfare of the people of the State of Ohio, in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

3. Whether Ohio Revised Code Section 3773.24, and the enforcement thereof, constitute aid or preference to, or protection or establishment of, certain religions by the State of Ohio, or prohibit the free exercise of other religions, in violation of the First and Fourteenth Amendments to the Constitution of the United States.

4. Whether Ohio Revised Code Section 3773.24, and the enforcement thereof, violate requirements set forth in the First and Fourteenth Amendments to the Constitution of the United States concerning the establishment of religion and the free exercise thereof, due process of law and equal protection of laws, in that they prefer consumers of certain religious persuasions and operate to the disadvantage of and in discrimination against those of other religious persuasions.

5. Whether the exemption in Ohio Revised Code Section 3773.24, pertaining to persons who conscientiously observe the seventh day of the week as the sabbath, prevents that Section from violating the First and Fourteenth Amendments to the Constitution of the United States.

E. STATEMENT OF THE CASE.

The Appellant was charged with violating Section 3773.24 of the Revised Code of Ohio, as amended July 14, 1959, in that he knowingly and intentionally caused a retail store known as FAME, of which he was acting manager, to be open for the transaction of business on Sunday, July 26, 1959.

FAME is located in the City of Maple Heights in the State of Ohio, within the trading area of Greater Cleveland. The store is a large retail closed door membership department store. There are presently approximately 75,000 customer members of Fame. The store has the selling area of approximately 37,000 square feet. The store is in direct competition with other large department stores located throughout northern Ohio. The store caters to a large number of out-of-town members who find it convenient to come to the Greater Cleveland trading area

to shop on Sunday (R. 36, 37). The store is typical of the large multi-unit retail operations which have attained a position of prominence in the retail merchandising field throughout the United States.

Sunday prohibitions had been on the statutes of Ohio for well over 100 years when in 1953 the Ohio Legislature enacted Section 3773.24. This section contained the following exceptions:

> "This section does not apply to work of necessity or charity, and does not extend to persons who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday.
>
> "This section does not prevent emigrating families from traveling, watermen from landing their passengers, or keepers of toll bridges, tollgates, or ferries from attending them on Sunday."

While the foregoing was in effect the Supreme Court of Ohio decided that it met all constitutional requirements. *State v. Kidd*, 167 O. S. 521 (1958), 150 N. E. 2d 413. On July 14, 1959, the Ohio Legislature enacted as an emergency measure the amended Revised Code Section 3773.24 set forth at Paragraph C hereof. As is apparent in the reading of the two statutes, substantial changes in the exemptions and classifications were made by the 1959 amendment. Appellant was convicted under the statute as amended in 1959. The Ohio Supreme Court, evidently relying on *State v. Kidd, supra*, concluded that no debatable constitutional issue is presented by Appellant's conviction under the statute as amended.

Appellant was tried in the Municipal Court of Garfield Heights, Ohio. During the trial, the Appellant moved to dismiss on the ground that the statute violated the First and Fourteenth Amendments to the Constitution of the

United States. The Trial Court overruled the Appellant's motions, the exceptions of the Appellant were noted and the Trial Court found the Appellant guilty. (Appendix A and R. 56.) A fine was imposed under Ohio Revised Code Section 3773.99(Q).

The Appellant appealed to the Court of Appeals of Cuyahoga County and in accordance with the rules of that Court submitted Briefs and Assignments of Error raising the issues of the constitutionality of the statute under the First and Fourteenth Amendments to the Constitution of the United States. Oral argument was held in that Court, and on the 8th day of April, 1960, that Court affirmed the decision of the Trial Court without opinion. (Appendix B.)

The Appellant, on appeal as of right, filed a motion to certify the record to the Supreme Court of the State of Ohio, together with a brief and assignments of error again raising the issue of the validity of the statute under the First and Fourteenth Amendments to the Constitution of the United States. Oral argument was held, and on July 6, 1960, the Supreme Court of Ohio dismissed the appeal. (Appendix C.)

F. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND WERE WRONGLY DECIDED BELOW.

1. THE ISSUES BEING FUNDAMENTAL IN NATURE AND WIDESPREAD IN CONSEQUENCE ARE SUBSTANTIAL.

Sunday Closing Laws affect vast segments of the economy of the United States. This case, arising within one major segment, the retail merchandising field, focuses on the conflict between downtown stores and suburban stores. Since the end of World War II the pattern of urban living, once concentrated in the downtown area, has undergone a marked change. Suburban areas have now be-

come major centers of retail trade. The change has brought with it intense competition between the downtown and the suburban stores. One battle in this competitive struggle is currently being fought over the Sunday opening of some stores. Suburban stores, having found that the populace is interested in shopping on Sunday, have remained open on Sunday. The result has been to produce a large amount of business on Sunday for suburban stores to the alleged detriment of the downtown stores.

In an attempt to protect their competitive position the downtown stores have invoked the aid of Sunday closing statutes. Thus, statutes originally designed to protect Sunday as a day of religious observance also have now become devices for economic regulation, aiding one competitor against another.

It is in this context that the prosecution in this case has been brought and in which the validity of the Ohio Sunday Closing Law is being contested.

This prosecution raises issues under the Constitution of the United States which may be summarized as follows:

1. Does the Ohio Sunday Closing Law violate the constitutional mandate that Church and State be separated?

More particularly:

a. does the statute constitute an aid to religion?

b. does the statute prefer one religion to the prejudice of others?

c. does the statute prohibit the free exercise of religion?

d. does the statute's seventh day conscientious observance exemption constitute aid to religion and/or religious discrimination?

2. Does the Ohio Sunday Closing Law violate the due process clause of the Constitution of the United States in that it does not bear a reasonable relation to the health and safety of the public?

3. Does the Ohio Sunday Closing Law violate the equal protection clause of the Constitution of the United States in that it:

a. contains classifications which are arbitrary and are not based upon real and substantial differences?

b. discriminates against those persons observing the seventh day or some other day of the week as their Sabbath?

It is submitted that these issues, involving the most fundamental constitutional safeguards of individual and minority-group rights, are substantial. Moreover, the decision in this case will affect not only this Appellant, but its impact will also be felt by all retailers, large and small, as well as by those who invest in retail stores, work for them, and patronize them. This is true not only in Ohio, but also in every state in the Union which now has or may in the future have such legislation. Finally, the decision will have a significant effect upon the rights of all religious minorities.

The issues being not only fundamental in nature but also widespread in consequence, are therefore substantial.

Against this background each of the following fundamental issues must be considered.

2. THE OHIO SUNDAY CLOSING LAW AND THE ENFORCEMENT THEREOF VIOLATES THE CONSTITUTIONAL MANDATE THAT CHURCH AND STATE BE SEPARATED.

Let us first examine the statute as it involves the separation of Church and State, a relationship always considered to be of substantial importance. There can be no doubt that the courts have always been jealous to protect the constitutionally mandated separation between Church and State. As this Court has said:

> "We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the State and Religion is best for the State and best for Religion' * * * if nowhere else, in the relation between Church and State. 'good fences make good neighbors.' " *McCollum vs. Board of Education*, 333 U. S. 203, 232 (1948).

a. The Ohio Sunday Closing Law Constitutes a Legislative Aid to Religion.

The Ohio Sunday Closing Law jeopardizes the separation of Church and State in that it involves the State of Ohio in matters of religion. An Ohio Court has said the purpose of the statute is to support the religious and devotional life of the community. *State v. Haase*, 97 O. App. 377, 116 N. E. 2d 224, (1953).

This judicially announced purpose clearly involves the State of Ohio in a matter which is not its concern, for, as this Court has held:

> "Neither a State nor the Federal Government can set up a Church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.* Neither can force or influence a person to go to or remain away from Church against his will or force him to profess a belief or disbelief in any re-

ligion." *Everson vs. Board of Education*, 330 U. S. 1 (1947). (Emphasis supplied.)

A statute admittedly designed to aid the devotional life of a community is clearly an aid to religion. By depriving a citizen of his right to engage in sectarian activities on Sunday, the state is using its power to influence a citizen to worship during the time set aside for that purpose.

b. The Ohio Sunday Closing Law Prefers One Religion and Prohibits the Free Exercise of Others.

The Ohio Sunday Closing Law places the State in the position of protecting a particular religious belief, of protecting those citizens subscribing to that belief, and protecting the observance of that belief. Sunday is the Christian day of worship. The statute, by depriving non-worshippers of their right to pursue economic gain, protects business men who desire to worship on Sunday. They may worship secure in the knowledge that the State of Ohio has deprived non-Christian and non-worshipping competitors of the right to compete in the market place on Sunday. It is not our purpose to discuss the merits of worship. The legal question before this Court is whether or not Christian worship, however desirable, may be influenced and protected by a State to the detriment of non-Christian worshippers or non-worshippers. A statute restricting a person disdaining worship on Sundays clearly aids and influences those desiring to worship on Sundays without risk of loss to their economic competitors. Such influencing and protecting is not a proper function of the State of Ohio.

The Ohio Sunday Closing Law puts the State of Ohio in a position of forcing non-Christians to show respect for

and to honor the Resurrection and the doctrine of the Divinity of Jesus. In a recent case involving the Pennsylvania Sunday Blue Law, Judge Alexander said:

> "There is in the record of this case, for the first time in any case I have found, explicit and uncontradicted testimony by expert witnesses that Sunday is the Lord's Day among Christians, that it commemorates the Resurrection of Jesus just as does Easter, that to accept Sunday as a holy day is to accept the Divinity of Jesus, that to be compelled by law to refrain from work on Sunday is to be compelled by law to show respect for and to honor the Resurrection and the doctrine of the Divinity of Jesus.
>
> "Refraining from work, under compulsion of law, is a compulsory form or symbol of respect, like kneeling or standing or covering or uncovering the head. This is offensive, according to the expert witnesses, to Seventh Day Christian Sabbatarians and to Jews, and I believe to persons of religious faiths other than the Christians, to atheists, agnostics and even to those devout Christians who feel that religion is a matter for one's own conscience, uncoerced by any secular authority." *Commonwealth of Pennsylvania v. Cavalero*, U. S. Law Week 2551 (1960).

Sunday observance is not only recognition of the Divinity of Christ, but it is a form of compulsory religious observance. Compulsory abstention from work without regard to periods of rest provided by other statutes, union contracts, and individual decision is enforcement of a religious Sabbath. Even though a person does not choose to worship, his *enforced* idleness is a symbol of religious observance. Such a symbol, imposed by the State of Ohio is, like the flag salute, an improper extension of legislative authority into areas reserved from governmental control by the First and Fourteenth Amendments to the Con-

stitution of the United States. *West Virginia v. Board of Education*, 319 U. S. 624 (1943).

c. The Seventh Day Exemption Under the Ohio Sunday Closing Law Constitutes Aid to Religion and/or Religious Discrimination.

The Ohio statute, unlike the Sunday laws of many other states, provides an exemption for those who conscientiously observe the seventh day of the week as their sabbath.[1] Under the Ohio statute persons "who conscientiously observe the seventh day of the week as the sabbath, and abstain thereon from doing things prohibited on Sunday" are permitted to engage in activities on Sunday otherwise prohibited. The very existence of this exemption raises several additional substantial issues.

This case, unlike any already pending before this Court, raises the question of the effect of this seventh-day observance exemption on the constitutionality of a Sunday Closing Law. Although the Massachusetts statute contains a seventh-day observance exemption it has been so narrowly construed by the Massachusetts Court that it is in effect no exemption at all. *Commonwealth v. Has*, 122 Mass. 40 (1877).

The provision of the Ohio Sunday Closing Law exempting those who conscientiously observe the seventh day as the Sabbath indicates that the purpose of the statute is to aid religion. Notice that a person who rests on the seventh day of the week is prevented from engaging in activities prohibited on Sunday, but a person who

[1] See Appendix to Appellant's Brief, *Gallagher v. Crown Kosher Supermarket of Mass., Inc.*, Supreme Court of the United States, October Term 1960, No. 11, for a compilation of Sunday closing laws of all states, including those containing seventh day observance exemptions.

"conscientiously observes the seventh day of the week as the sabbath" may engage in activities otherwise prohibited. Since worship and not resting is the test used to determine the application of the exemption, does not the use of this test prove that the purpose of the statute is to aid religion and is not to provide a day of rest?

In addition, the exemption, which does not protect those who fail to conscientiously observe the seventh day as the sabbath, grants a preference to certain religions over others and to certain religions over those with no traditional religious belief. It is important to note that no exemption is made for those religions which do not observe Saturday or Sunday as their sabbath, such as the substantial Moslem community in Ohio, which observes Friday as its sabbath (see *State v. Woodville Appliance Inc.*, 13 O. O. 2d 46, 49 (1960)). Nor is any exemption made for those who do not wish to observe any day as the Sabbath. The result is discrimination against these minority groups.

The Ohio Sunday Closing Law also involves the application by enforcement officials of a religious test, for in deciding who qualifies for the exemption and who violates the criminal statute some public official must make an investigation and determination as to whether a citizen "conscientiously observes" the sabbath.

Finally, there is a serious question as to whether any classification based upon religious difference is valid under the equal protection clause of the Federal Constitution. *Cf. Brown v. Board of Education*, 347 U. S. 483, 494-95 (1953).

3. THE OHIO SUNDAY CLOSING LAW, BEARING NO REASONABLE RELATION TO THE HEALTH AND SAFETY OF THE PUBLIC, VIOLATES THE DUE PROCESS CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

a. The Statute Deprives This Appellant and Others of Valuable Rights and Property.

The instant case involves a substantial and fundamental issue of due process. The enforcement of the Ohio Sunday Closing Law against this Appellant deprives him of the right to pursue economic gain by working on Sunday. The statute likewise deprives a corporate entity and a sole proprietor of the use of their property on Sunday. Moreover, the statute deprives customers of their right to seek the best available merchandise at reasonable prices or to make purchases on Sunday. Finally, despite the existence of the exemption in the statute for persons who conscientiously observe the seventh day of the week as the Sabbath, the statute deprives those persons who may observe the seventh day Sabbath from sundown on Friday to sundown on Saturday, of Saturday evening business as well as of all Sunday business. The effect of this is that a business man observing the seventh day Sabbath in the aforementioned manner must be closed at least one and one-third (1⅓) days rather than one day.

For the foregoing reasons it is obvious that the statute deprives persons and entities of valuable rights.

b. Appellant Is Deprived of These Valuable Rights Without Due Process of Law.

The basic test of whether a statute which takes away valuable rights complies with due process requirements is whether the statute bears a reasonable relation to the health and safety of the people.

"Laws or ordinances passed by virtue of the police power which limit or abrogate constitutionally guaranteed rights must not be arbitrary, discriminatory, capricious or unreasonable and must bear a real and substantial relation to the object sought to be obtained, namely, the health, safety, morals or general welfare of the public.

"The Courts of this country have been extremely zealous in preventing the constitutional rights of citizens being frittered away by regulations passed by virtue of the police power.

"If an enactment is referable to the police power, to be valid, the court must be able to say that it tends in some substantial degree to the prevention of offenses, or the preservation of the health, morals, safety or general welfare of the public. Therefore, if it is apparent that there is no plausible, reasonable and substantial connection between the provisions of the act and the supposed evils to be suppressed, there exists no authority for its enactment. Legislative bodies may not under the guise of protecting the public interest, interfere with private business by imposing arbitrary, discriminatory, capricious or unreasonable restrictions upon lawful business.

"We realize that the police power is elastic to meet changing conditions and changing needs, yet it cannot be used to abrogate or limit personal liberty rights contrary to constitutional sanction." *Cincinnati v. Correll,* 141 O. S. 535, 539-40, 49 N. E. 2d 412, 414 (1943).

The Constitutional test is that the law:

"must bear a real and substantial relation to the object sought to be obtained, namely the health, safety, morals, or general welfare of the public." (Ibid.)

The Ohio Sunday Closing Law provides, subject to certain exceptions, that all persons and corporations must

est on Sunday. Such an enactment does not bear a rea-onable relation to the health and safety of the public. It s one thing to say that persons must rest one day out of even. It is quite another thing to say that all persons must est together on the same day without concern for maxi-num number of days in a week on which a person may ave worked or without concern for the number of hours person may have worked in a given week. Legislation miting the number of days or hours of work for indi-iduals, such as the child labor laws and minimum wage nd hours laws, bears a reasonable relation to health and afety. Ohio has such legislation concerning these prob-ems. The sole concern of the Ohio Sunday Closing Law is, owever, that everyone should rest on Sunday. Modern ociety is complex. It is no longer composed of inde-endent family units as it was when our society was pri-narily agrarian. Today it is arbitrary to require all conomic activity to cease on one day of the week. Society emands that newspapers, steel mills, and other business nterprises remain open on Sunday. Although not ex-mpted under the Ohio statute, such institutions do re-nain open on Sunday. The Ohio Sunday Closing Law herefore is arbitrary and capricious, and is lacking in the equisite relation to a valid legislative purpose in bringing o a halt all economic activity on Sunday.

Judge Magruder has said:

"* * * the objection is well taken that, in furtherance of no legitimate interest which Massachusetts is entitled to safeguard, the statute arbitrarily requires Crown Market to be closed on Sunday, thereby causing the corporate plaintiff to lose potential sales and to be denied the right to use its property on Sunday, with the result of depriving the corporate plaintiff of liberty and property and the other plaintiffs of

liberty, without due process of law, contrary to the Fourteenth Amendment.

"We think in addition that, on the decided case, the discriminations apparent on the face of the Statute constitute a denial of the equal protection of the laws, forbidden as well by the Fourteenth Amendment. (Citing cases)." *Crown Kosher Supermarket of Mass. v. Gallagher,* 176 F. Supp. 466, 475 (D. Mass. 1959).

4. THE OHIO SUNDAY CLOSING LAW DENIES THIS APPELLANT AND OTHERS EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

a. The Legislature Has the Right to Make Classifications Based Upon Real and Substantial Differences.

The Legislature, within its police power, may classify, as has been stated by this Court in *Morey v. Doud,* 354 U. S. 457, 466 (1957):

> "Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.' "

Legislative classifications, to be valid, must be based on real and substantial differences *and* in addition must bear a reasonable relation to the subject matter of the legislation. *Morey v. Doud, supra,* and *Cincinnati v. Correll, supra.*

b. The Classification Made By the Ohio State Legislature Is Not Based Upon Real and Substantial Differences Amongst Classes.

The statute with which we are here concerned, the Ohio Sunday Closing Law, restricts the basic freedom granted to individuals by the Bill of Rights. The statute does not meet the standards imposed on legislative exercise of the police power; it does not bear a real and substantial relation to the health and safety of the public, and its classifications are not based on real and substantial differences bearing a relation to the health and safety of the public.

In addition to exempting those who conscientiously observe the seventh day of the week as the Sabbath from the operation of Sunday restrictions, the Ohio Sunday Closing Law exempts the following:

> "(A) Traveling or the providing of services and commodities incidental thereto;
>
> "(B) Recreation, sports, amusements, entertainment, or exhibitions or the providing of services and commodities incidental thereto;
>
> "(C) Fairs held under the authority of the state or a political subdivision, or independent fairs, or the providing of services and commodities incidental thereto;
>
> "(D) The operation of publicly owned places of entertainment, recreation, or education, by a public officer, concessionaire, exhibitor, or employees of all or any of them, or any other person, or the providing of services and commodities incidental thereto."

The above classification may appear on its face to be reasonable. It is apparent upon examination, however, that these exceptions permit Sunday activities by persons who are, and Sunday sales of products which are in direct

competition with Appellant. They also permit work by persons who are no less in need of rest than the Appellant; and they permit operations which are no less calculated to disturb the peace and quiet of the community than the operation supervised by the Appellant. For example, the Appellant supervises sales of automobile tires and accessories, sporting goods, food, toys, hardware supplies and many other miscellaneous items. Under Paragraph A of the statute, gasoline stations may remain open and sell tires and automobile accessories. Under Paragraph B sporting goods stores, hobby stores and do-it-yourself stores may remain open despite the fact that they are in direct competition with departments supervised by the Appellant.

The difference in treatment between businesses which are allowed to remain open on Sunday and those which are not allowed to remain open on Sunday is not based upon any substantial differences, but rather is arbitrary and unreasonable. The difference between a sporting goods store and the FAME store is not one upon which a valid legislative classification may be based. Nor is the legislative classification based upon differences pertaining to the health and safety of the citizens of Ohio. The health of the employee of the sporting goods store is no less affected than the health of the Appellant. The peace and quiet of citizens in general are no less disturbed by the operation of the sporting goods store than by the operation of FAME.

c. The Ohio Sunday Closing Law Discriminates Against Observers of the Seventh Day of the Week as the Sabbath in Violation of the Equal Protection Clause of the Constitution of the United States.

Members of the consuming public who observe Saturday, the seventh day of the week, as their Sabbath and shop on Sunday may not avail themselves of the facilities of stores which the Ohio Sunday Closing Law closes on that day. The result is that while those who worship according to their conscience on Sunday have six days available to them for shopping or working, the conscientious observer of the seventh day is limited to five days of the week for those pursuits. Thus equal religious observance results in unequal secular treatment. Were this unequal treatment a result of individual choice made by a person desiring to close on Sunday, it would not be objectionable. There is a serious objection, however, when the inequality in treatment is imposed by an act of the state.

This conclusion was reached by Judge Magruder:

> "Crown Market's Orthodox customers also lose much of the value of their Sunday under the same penalty, since if the law is constitutional, they may not shop on either Saturday or Sunday. Without doubt if they remain faithful to their religious convictions, they will be under a very substantial disadvantage as compared with shoppers whose Sabbath is observed on Sunday." *Crown Kosher Super Market of Mass., Inc., v. Gallagher*, 176 F. Supp. 466, 475 (D. Mass. 1959).

5. THIS COURT'S ACCEPTANCE OF OTHER SIMILAR CASES FOR HEARING IN THIS TERM INDICATES THAT THE ISSUES PRESENTED HERE ARE SUBSTANTIAL.

Acceptance for hearing by this Court of several similar cases indicates that constitutional questions raised by the Ohio Sunday Closing Law are substantial.

This Court already has set for hearing and now has pending before it several cases which raise some constitutional issues which are similar to those presented by this case. *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, October Term 1960, Dkt. No. 11; *McGowan v. Maryland*, October Term 1960, Dkt. No. 8; *Bargaintown, U. S. A., Inc. v. Whitman*, October Term 1960, Dkt. No. 76, and *Two Guys From Harrison-Allentown, Inc. v. McGinley*, October Term 1960, Dkt. No. 36. The number of cases accepted for hearing by this Court indicates the importance and substantial nature of the constitutional questions raised in this case. Additional evidence of the substantial nature of the issues involved is the large number of amicus curiae briefs filed in these cases.

The several statutes involved raise a variety of questions in a number of contexts. This Court's decisions in the several cases now before it can be most effective in putting to rest the problems created by Sunday Closing laws if they dispose of all the major issues raised by such laws. In the *Crown Kosher* case the Appellant argues that the Appellees there have no standing to raise any of the issues decided by the statutory three-judge District Court. To help insure that this Court can reach all of the issues raised by the cases before it, and can dispose of the issues involved solely on the merits, the Court should accept and add this case to those already pending before it.

In addition, any full consideration of the issues raised by Sunday closing laws must consider the effect of a conscientious seventh day observer exemption. Of the statutes before this Court two (Maryland and Pennsylvania) contain no such exemption. The third (Massachusetts) contains such a provision, though it has been concluded that this exemption is for all practical purposes ineffective. *Commonwealth v. Has,* 122 Mass. 40 (1877). The Ohio statute contains such a provision which is given effect in practical administration of the statute. Twenty other states similarly provide a sabbatarian exemption. Thus, in order to put that particular issue at rest, along with the others involved in Sunday closing legislation, it is respectfully prayed that this Court should hear this case along with the others already on its docket.

CONCLUSION.

The Ohio Sunday Closing Law raises several issues of the most fundamental nature. The law destroys the separation between Church and State, preferring one form of religious belief and prohibiting the free exercise of all others. The law, lacking a reasonable relation to the health and safety of the public, violates the due process clause of the Constitution. Similarly, it denies this Appellant, and many others, the equal protection of the laws, its classification not being based on any real and substantial differences amongst the classes. Finally, the presence of a seventh-day exception to the statute raises a series of additional constitutional objections.

In view of the numerous substantial issues raised by the conviction of this Appellant, and the widespread significance that a decision in this case will have, it is respect-

fully submitted that this Court should note probable jurisdiction in the matter and set it for hearing with the several other similar cases already pending.

Respectfully submitted,

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Dated: November 11, 1960.

APPENDIX A.

Court's Finding and Fine.

CRUDELE, *J.*: The Court is convinced beyond a reasonable doubt that the defendant was acting manager of the said store on the day in question; that despite the fact that his alibi was not successfully controverted the fact still remains that he and he alone was responsible for the conduct of all the employees of Fame, Inc. on duty on July 26, 1959; that it was within his power to discharge any such employee for failure to report to work; that said store was opened for the transaction of business on a Sunday; that the business conducted with the complaining witness was not exempted by the statute; that in view of the motions herein made the defendant is *not* one who conscientiously observes the seventh day of the week as the Sabbath and abstains thereon from doing things prohibited on Sunday; that in view thereof, the Court finds the defendant guilty as charged and hereby assesses a fine of twenty-five dollars. The defendant to pay costs.

To which findings and fine exceptions of defendant were noted.

APPENDIX B.

Journal Entry of the Court of Appeals of Cuyahoga County, Ohio.

(Filed April 8, 1960.)

This cause came on for hearing on the transcript of the record, the bill of exceptions, the briefs and on the oral arguments of counsel on the 9th day of March, 1960 on the appeal of J. DAVID BROUGHTON on questions of law and fact from the ruling of the Municipal Court of Garfield Heights, Ohio in Cause No. 15026, in which ruling said trial court found the appellant guilty of a violation of the provisions of Ohio Revised Code Section 3773.24 as amended July 14, 1959.

This Court of Appeals being fully advised in the premises finds no errors in the proceedings in the court below and that its said judgment should be affirmed and that there was reasonable grounds for appeal.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that a judgment and findings of the Municipal Court of Garfield Heights be and the same is hereby affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that J. DAVID BROUGHTON pay the costs of this appeal.

To all of which the appellant, J. David Broughton, excepts.

APPENDIX C.

Final Order of the Supreme Court of the State of Ohio.

(July 6, 1960.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, as upon the motion of the appellee to dismiss the appeal, filed as of right herein, and was argued by counsel.

On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, sua sponte dismissed for the reason no debatable constitutional question is involved in said cause.

It is further ordered and adjudged that the appellee recover from the appellant its costs herein expended, taxed at $

ORDERED, That a special mandate be sent the Municipal Court of the City of Garfield Heights, Ohio, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Cuyahoga County, "for entry."